

MEMO ENDORSED

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May 1, 2023

Via ECF
Hon. Valerie Caproni, USDJ
United States District Court
Southern District of New York
40 Foley Square, Room 420
New York, NY 10007

**REQUEST FOR ORDER DIRECTING THE CLERK OF THE COURT
TO ACCEPT FOR FILING PLAINTIFF'S TIMELY-FILED
THIRD AMENDED COMPLAINT**

Re: Wirth v. Domerson, et al.
United States District Court
Southern District of New York
22-CV-10809 (VEC)

Your Honor:

We are counsel to the plaintiff in this matter. We hereby request an Order directing the Clerk of the Court to accept for filing plaintiff's timely-filed Third Amended Complaint, dated April 3, 2023. Docket No. 33.

On March 16, 2023 this Court entered an Order providing that "Plaintiff's deadline to amend the complaint . . . is April 3, 2023." Docket No. 28. On March 29, 2023 plaintiff filed a Second Amended Complaint, dated March 28, 2023. Docket No. 32. On April 3, 2023 plaintiff filed a Third Amended Complaint, dated April 3, 2023. Docket No. 33. On April 5, 2023, the Clerk of the Court issued a Notice stating that:

"The filing [of the Third Amended Complaint] is deficient for the following reason(s): the order granting permission to file the pleading was not attached; Court's leave has not been granted. File the Exhibit to Pleading event found under the event list Other Documents and attach either opposing party's written consent or Court's leave."

Although the Clerk's notice is ambiguous, I called the Clerk and was told that the real reason for the rejection of the Third Amended Complaint was the fact that the Second Amended Complaint had been filed earlier and the Clerk interpreted the Court's March 16 Order as allowing only one amendment, despite the fact that the Court's Order says no such thing.

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Defendant Domerson filed an Answer to the Third Amended Complaint on April 18, 2023. Docket No. 39. The GEICO defendants moved to dismiss the Third Amended Complaint on April 17, 2023. Docket No. 36.

Plaintiff's Third Amended Complaint was filed in a timely manner pursuant to the March 16, 2023 Order of this Court. The primary difference between the Second Amended Complaint and the Third Amended Complaint is a cause of action against GEICO for breach of contract. There is and can be no prejudice to any of the defendants by the Third Amended Complaint since (1) it was timely, (2) defendant Domerson is unaffected by the breach of contract action, which is the only substantive difference, and (3) the GEICO defendants already moved to dismiss the Third Amended Complaint.

I have asked defense counsel for their consent. Domerson's counsel has consented but GEICO's counsel has refused to consent without explanation. We are therefore forced to write this letter seeking this Court's intervention to direct the Clerk to accept for filing plaintiff's timely-filed Third Amended Complaint.

Thank you for your anticipated consideration in this matter.

Very truly yours,

/s/ Marc A. Stadtmauer
Marc A. Stadtmauer

Application GRANTED. Plaintiff was free to amend the complaint as a matter of course after Defendants moved to dismiss. *See* Fed. R. Civ. P. 15; *see also* Dkt. 28. Plaintiff filed the Second Amended Complaint nearly one week before the April 3, 2023 deadline. Dkt. 32. Per Fed. R. Civ. P. 15, Plaintiff should have sought leave of Court to file the Third Amended Complaint (the "TAC"), even though Plaintiff filed the TAC by the Court-ordered deadline of April 3, 2023. The Court finds, however, that Defendants were not prejudiced by the filing of the TAC because it was filed by the deadline and well before Defendants' Court-ordered deadline to move again for dismissal. *See* Dkt. 28.

IT IS HEREBY ORDERED that Plaintiff is granted leave to file the TAC *nunc pro tunc* April 3, 2023.

IT IS FURTHER ORDERED that Defendants' first motion to dismiss, filed at docket entry 24, is DENIED as moot. The Clerk of Court is respectfully directed to close the open motion at docket entry 24.

SO ORDERED.



Date: 5/2/2023

HON. VALERIE CAPRONI
UNITED STATES DISTRICT JUDGE